

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

PL-2
Cohen
118684

FILE: B-206077.2

DATE: June 14, 1982

MATTER OF: TMG & Partners, Architects

DIGEST:

1. GAO will not question the contracting officer's determination that a small business is nonresponsible where the Small Business Administration (SBA) affirms that determination by refusing to issue a certificate of competency. In addition, GAO will not question the SBA's refusal to issue a certificate of competency absent a showing of fraud or bad faith.
2. A contract implied in fact will not be found where the parties' conduct in light of the surrounding circumstances does not show a mutual intention to contract.
3. Firm that allegedly incurred expenses in expectation of receiving a contract that instead was awarded to another offeror may not be reimbursed on a quantum meruit or valebant basis since there is no evidence that the Government received a benefit.

TMG and Partners, Architects, protests the Corps of Engineers' finding that the firm was nonresponsible and thus ineligible for the award of a contract for certain construction-related projects (numbers 461, 462 and 463E) at Fort Hood, Texas. TMG also requests payment for services that it performed in anticipation of receiving the contract.

We will not consider the merits of the protest against the nonresponsibility finding, and we deny the claim for payment.

Protest

Following the nonresponsibility determination, TMG applied to the Small Business Administration (SBA) for a certificate of competency (COC). The SBA declined to issue a COC.

The SBA has conclusive authority to determine the responsibility of a small business by issuing or declining to issue a COC, 15 U.S.C. § 637(b)(7)(Supp. III 1979). Our Office therefore will not question a contracting officer's determination that a small business is nonresponsible where the SBA affirms that determination by refusing to issue a COC. See Stoner - Caroga Corp. Inc., B-204307, August 26, 1981, 81-2 CPD 182. Nor will we question the SBA's refusal to issue a COC in the absence of a showing by the small business that the refusal stemmed from fraud or bad faith. See Dan's Janitorial Service & Supply, B-200360, January 22, 1981, 81-1 CPD 36. There is no evidence of fraud or bad faith here.

Claim

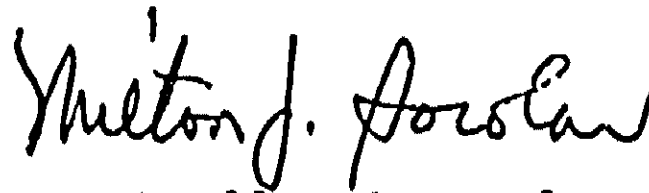
TMG alleges that between the time that the Corps initially selected TMG and the nonresponsibility finding, the Corps led the firm to believe that it could proceed with and would be compensated for work done to meet the Corps' needs in anticipation of receiving the contract. TMG asserts that it relied on the Corps' representations to that effect in spending a considerable amount in fees for consultants and support personnel. TMG argues that it is entitled to reimbursement for those expenses on the basis that a contract for them should be implied from the Corps' actions. TMG contends that at least it should be reimbursed on a quantum meruit or valebant basis, that is, for the reasonable value of the services rendered or supplies delivered.

A contract implied in fact is founded on a meeting of minds which, although not embodied in an express contract, is inferred from the parties' conduct, in light of the surrounding circumstances, showing their tacit understanding. See 55 Comp. Gen. 768, 777 (1976). Here, however, the Corps categorically denies that it authorized any pre-contract work. The Corps states that TMG's vice president proposed to perform some work before actually being awarded the contract, but asserts that he "was told explicitly that such practice was not allowed and that if his firm proceeded, they did so at their risk." The facts and circumstances thus do not show a mutual intention to contract to permit recovery on an implied contract basis. See Anheuser-Busch, Inc., B-192739, September 29, 1978, 78-2 CPD 246.

The right to payment on a quantum meruit or valebant basis is predicated on the theory that the Government should not retain a benefit without paying for it. See 40 Comp. Gen. 447, 451 (1961). While the record shows.

that TMG did deliver to the Corps certain drawings, design analyses, and cost estimates in expectation of the award, the Corps returned them to TMG after the subsequent non-responsibility finding. There is no evidence in the record that the information submitted by TMG, or any other pre-contract services the firm may have performed, benefited the Government. Absent a benefit to the Government, TMG is not entitled to payment. See Cyber-Synectics Group, Inc., B-198344, July 9, 1980, 80-2 CPD 22.

The protest is dismissed, and TMG's request for relief is denied.



Acting Comptroller General
of the United States